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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-217339

DATE: June 11, 1985

MATTER OF: Technical Sergeants Brenda J. Sykes, USAF,
and Lee A. Sykes, USAF

DIGEST: Two Air Force members divorced from each other claim basic allowance for quarters at the "with dependent" rate based on their one child as a dependent. A court awarded child custody to the mother and ordered the father to make monthly child-support payments of \$100. The regulations required monthly support payments of at least \$113.40 to qualify the non-custodial parent for the increased allowance. The non-custodial member voluntarily offered to supplement the court-ordered amount to meet the regulation's qualifying amount. The custodial member attempted to reject the excess. The regulations do not give the non-custodial member power to alter, unilaterally, the obligations of the members established by the court; therefore, in the absence of a court decree ordering him to pay at least the monthly qualifying amount, or the custodial member's voluntary acceptance of the extra amount, the non-custodial member is not entitled to the increased quarters allowance, while the custodial member may be paid the increased allowance.

This case concerns the question of whether a divorced member of a uniformed service is entitled to the basic allowance for quarters at the "with dependent" rate on the basis of having legal custody of the only child of a marriage to another military member who also claims the allowance based on an offer to voluntarily supplement a monthly court-ordered child-support payment of \$100 per month that would not qualify him otherwise for the increased allowance.^{1/} We conclude that where the non-custodial member is

^{1/} The request was submitted by Captain R. D. Watson, USAF, Accounting and Finance Officer, Headquarters 438th Military Airlift Wing, McGuire Air Force Base, New Jersey. It was approved by the Department of Defense Military Pay and Allowance Committee as Air Force submission number DO-AF-1448.

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ordered by the court to make a monthly support payment that is less than the amount required by regulation for entitlement to the "with dependent" rate, a claim by the custodial member for the same allowance may be paid where she/he is contributing a substantial amount of the child's support and is not occupying Government quarters.

Facts

Technical Sergeant Brenda J. Sykes claims a basic allowance for quarters at the "with dependent" rate on behalf of her child which she has in her legal custody. The propriety of paying the claim arose when her former husband, and father of the child, Technical Sergeant Lee A. Sykes, also claimed the allowance on the basis that the child should be considered his dependent because he makes payments to Brenda for the support of the child.

A June 28, 1982 divorce decree incorporating a separation agreement awarded the mother custody of the child and ordered the father to pay \$100 per month child support. He paid \$100 per month from April 1982 through October 1983, then increased the amount to \$110 in November and December 1983, and again increased it to \$125 in January 1984, an amount that he has paid ever since. With a letter to him of February 21, 1984, Brenda Sykes returned \$45, the excess over the \$100 court-ordered monthly amount she received in November and December 1983, and January 1984, and announced her intentions to refuse any amount in excess of \$100 unless the increased amount was ordered by the court. However, Lee Sykes returned her \$45 check and she then began receiving a \$125 monthly allotment from his pay in April 1984.

Lee Sykes occupied non-Government quarters during the relevant period. Until January 1984, he received quarters allowance at the "without dependent" rate. Effective January 23, 1984, he requested, and since then has received, the allowance at the "with dependent" rate. Brenda Sykes departed Government quarters and filed her claim for quarters allowance at the "with dependent" rate on January 16, 1984.

The difference between the "with" and "without" dependent rates for Lee Sykes for the period of the claim was \$113.40. As indicated, he offered \$125 monthly support

payments beginning in January 1984. The question presented by these circumstances is whether the custodial member (Brenda) is entitled to the increased allowance on the theory that the court-ordered support payment is less than the amount required by regulation, or whether the non-custodial member (Lee) is entitled to it on the basis of his voluntary, though disputed, offer of an amount to supplement the deficient court-ordered payment which, in combination, would exceed the amount of child support required by the regulation as a basis for the entitlement to him.

Discussion

The extra amount of quarters allowance at the "with dependent" rate, provided under 37 U.S.C. § 403 (1982), is intended to reimburse members for part of the expense of providing quarters for their dependents. 60 Comp. Gen. 399 (1981). Two members may not receive the increased allowance on the basis of the same dependent. 51 Comp. Gen. 413 (1972), and Sergeants Mason and Smith, 64 Comp. Gen. 121, 123 (1984). Paragraph 30236 of the Department of Defense Military Pay and Allowances Entitlements Manual generally governs the situation where one member-parent is paying support for a child who is in the other member-parent's custody. See Sergeant Leocadia Doerfer, USAF, B-189973, February 8, 1979. As a general rule, where a non-custodial member pays child support in the amount required by the regulations, he/she qualifies for the entitlement. Technical Sergeant Mary L. Fabian, B-215235, March 19, 1985. More specifically, however, the regulation as a whole reflects the principle that where the amount of court-ordered support is less than the difference between the "with" and "without" dependents quarters allowance rates, the member having legal custody may claim the child if that member is providing substantial support and is not occupying Government quarters. Where the custody and support obligations of divorced members are created by court order or by separation agreement, their entitlements, if any, remain unchanged until the obligations change either by a new court order or by mutual agreement. Airman McCoy and Sergeant Cooper, 62 Comp. Gen. 315, 318 (1983).

Here, a court established the members' custody and child-support obligations. The court awarded child custody to Brenda Sykes and ordered Lee Sykes to pay \$100 per month

for the child's support. It is undisputed that the \$100 court-ordered amount does not satisfy the minimum support payment required by paragraph 30236a(1) of the Pay and Allowances Manual. That paragraph requires that where a member is ordered to pay support, he/she is entitled to the "with dependent" rate, provided the "monthly support ordered is not less than the difference between that member's 'with' and 'without' dependent BAQ rates." In this case the difference was \$113.40.

Although the regulation also provides that "when BAQ rates are later increased, support payments must be adjusted accordingly," we do not believe that that language was intended to convey to the non-custodial member the power to alter, unilaterally, the obligations of the members established by the court order. It would seem that any modification of the obligations would have to come from the court or by mutual agreement between the parties before any change could be made in the entitlement. Lee Sykes' voluntary offer of the supplemental amount had no effect on the legal obligations of the parties; Lee Sykes' court-ordered obligation for monthly child support remains at \$100. As long as Brenda Sykes refuses to accept the additional amount and the court-ordered obligation remains unchanged, Lee Sykes' support obligation is insufficient to allow him to claim the child as his dependent. Therefore, he would not be eligible for the increased allowance. Brenda J. Sykes, however, would be entitled to the additional allowance, so long as she is providing substantial support to the child, as appears to be the case. See Sergeant Leocadia Doerfer, USAF, B-189973, supra.

Concerning the "with dependent" rate quarters allowance payments which have been made to Lee Sykes since January 1984, it appears that Brenda attempted to return the extra \$25 child support she received for January but it was returned to her by Lee. It is not clear how much she received for February and March, but she indicates that in April she began receiving a \$125 monthly allotment. In any event, since Brenda Sykes made a good-faith effort to return the extra amounts and made it clear that she did not consider the amount of Lee Sykes' support obligation increased, Lee Sykes' support obligation for those months should be considered to be only \$100 per month. Therefore,

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Brenda is entitled to the "with dependent" allowance for that period, not Lee. The finance officer should make payment to Brenda accordingly, and take appropriate collection action from Lee.

for Milton J. Jorolan
Comptroller General
of the United States